

Summary of Senate Bill 4 (SBX2 4)

Senate Bill 4 (SBX2 4) - General Information

- Sponsor – State Senator Dave Codgill (14th District)
- Passed – February 15, 2009
- Signed by Governor – February 20, 2009
- Effective Date – May 21, 2009

Design-Build Demonstration Program

Location of Statutory Changes for Transportation DB Projects

- Public Contract Code 6800 et seq. (transportation)

Agencies Authorized to Carry Out Projects

- Caltrans
- “Local transportation entities” – Defined as:
 - local transportation authorities under Public Utilities Code Sections 180000 et seq. (entities created or designated by County Board of Supervisors);
 - Consolidated agency under Public Utilities Code Sections 132350 et seq. (San Diego County entities);
 - The Santa Clara Valley Transportation Authority; and
 - Any other transportation entity designated by statute as a regional transportation agency.

Number and Type of Projects Authorized

- California Transportation Commission may authorize up to 15 projects:
 - Up to 5 projects for local transportation entities
 - Up to 10 projects for Caltrans
- Projects are to vary in size, type and location
- CTC decides whether to use low bid or best value
 - CTC will try to balance the number of projects using low bid vs. best value
- Statute remains in effect only until January 1, 2014. After that date the statute is repealed.

CTC Conflict of Interest Policy

- CTC to develop guidelines for a standard organizational conflict-of-interest policy
- Policy to address the ability of a person/entity that performs procurement-related services for Caltrans or a local transportation entity to submit a proposal as a design-build entity or to join a design-build team

Types of Projects Eligible

- Local transportation entity projects (see PCC 6802(a))
 - Local street or road projects
 - Bridge projects
 - Tunnel projects
 - Public transit projects
- Caltrans projects (see PCC 6802(b)) – State highway, bridge or tunnel projects

- To be eligible for consideration, the proposed project must be subject to:
 - The existing process under the state transportation improvement program (see Gov. Code 14520);
 - The Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006 (see Gov Code 8879.20);
 - The traffic congestion relief program (see Gov. Code 14556); **OR**
 - The state highway operations and protection program (see Gov. Code 14526.5).

PECG / Project Development Services for Caltrans' 10 Projects

For Caltrans' 10 projects, Caltrans' employees and consultants are responsible for performing "project development services," such as drafting technical requirements documents and performance specifications, carrying out preliminary engineering and performing construction inspection services. This does not apply to the local transportation entities' 5 projects.

Labor Compliance Program Requirements

Depending on when the contract is awarded, transportation entities must (i) implement a labor compliance program (unless the transportation entity or design-build entity has already entered into a collective bargaining agreement) or (ii) pay a fee to Caltrans to support Caltrans' prevailing wage and labor compliance enforcement costs

Procurement Methods/Process

- **Request for Qualifications** (to pre-qualify design-build entities whose proposal shall be evaluated for final selection). The RFQ shall include the following components:
 - Basic scope, cost range, etc. for the project
 - Evaluation methodology / procedure for final selection
 - Significant evaluation factors related to qualifications, including technical design and construction expertise, labor force availability and all other non-price factors
 - Labor force availability means the existence of an agreement with a registered apprenticeship program (see 6805(c)(2)(B) for further details)
 - A standard Statement of Qualifications form for use by the interested parties. The transportation entity shall create this standard form, which among other things, must require submittal of relevant past experience, an acceptable safety record, licenses / registrations and evidence of capacity to obtain payment and performance bonding and liability and E&O insurance.
- **Request for Proposals** – Shall include, but not be limited to, the following components:
 - Basic scope, cost range, etc. for the project
 - Evaluation methodology, including whether the contract will be awarded on the basis of the lowest responsible bid or best value
 - Significant evaluation factors, including cost/price and all non-price factors
 - Relative importance or weight assigned to each of the evaluation factors
- **Low Bid Project Procurements** – Competitive process results in lump-sum bids and award is made to the lowest responsible bidder
- **Best Value Project Procurements** – Competition progresses as follows:

- Proposals evaluated using only the criteria and selection procedures identified in the RFP
- Evaluation factors must include
 - Price
 - Technical design and construction expertise
 - Life-cycle costs over 15 years or more
- The transportation entity may request proposal revisions and hold discussions and negotiations with responsive bidders (RFP must reserve this right)
- Award to proposer that submitted the best value proposal

Notice of Award / Supporting Information

- Transportation entity must publicly announce its award
- Announcement must identify the contractor to whom the award is made and provide a written decision supporting/stating the basis of the award
- Announcement must identify the second and third-ranked design-build entities
- Announcement and the transportation entity's contract file shall provide sufficient information to satisfy an external audit

Bonding / Insurance Requirements

- Payment and Performance Bonds
 - Amount of bonds set by the relevant transportation entity
 - Payment bond amount shall not be less than the performance bond amount
 - Bond forms provided by CTC
- Errors and omissions insurance coverage required for design elements of the project

Subcontracts with Entities Not Listed in SOQ/Proposal

- If design-build entity is to award subcontracts to entities not listed in the SOQ/Proposal, the design-build entity must:
 - Provide public notice consistent with the transportation entity's own requirements
 - Provide a fixed date and time for award
 - Establish reasonable qualifications criteria / standards
 - Provide that the work be awarded on a best value basis or to the lowest responsible bidder

Reporting Requirements

- Not later than June 30 each year after a design-build contract is awarded, the awarding transportation entity shall submit a project progress report to the CTC
- The CTC shall submit an annual report to the legislature that includes the information provided by the awarding transportation entity

Performance-Based Infrastructure

Location of Statutory Changes

- Streets and Highways Code 143

Agencies Authorized to Carry Out Projects

- Caltrans
- “Regional transportation agencies” – Defined as:
 - Transportation planning agencies as defined in Gov. Code Sections 29532 or 29532.1;
 - County transportation commissions as defined in Public Utilities Code Sections 130050, 130050.1 or 130050.2;
 - Any other transportation entity designated by statute as a regional transportation entity; and
 - Joint exercise of powers authority as defined in Gov. Code Section 6500, with the consent of a transportation planning agency or a county transportation commission.
- Caltrans and regional transportation agencies may procure these projects together or separately

Number of Projects Authorized

- Unlimited number of projects, but candidate projects (proposed by Caltrans and RTAs) must be selected by the CTC
- CTC will review proposed projects for consistency with the following objectives/requirements
 - Improve mobility
 - Improve the operation or safety of the corridor
 - Provide quantifiable air quality benefits
 - Address a known forecast demand (as determined by Caltrans/RTAs)
- Agreements may be entered into under this statute until December 31, 2016

Types of Projects Eligible

- PBI projects authorized by the statute include:
 - Highway projects
 - Public street projects
 - Rail projects
 - Related facilities supplemental to existing facilities currently owned and operated by Caltrans/RTAs
- The work on these projects may include one or more of the following:

○ Planning	○ Rehabilitation
○ Design	○ Improvement
○ Development	○ Acquisition
○ Finance	○ Lease
○ Construction	○ Operation
○ Reconstruction	○ Maintenance

Creation of Public Infrastructure Advisory Commission (PIAC)

- Auxiliary organization established by the Business, Transportation and Housing Agency
- Clearinghouse of PBI-related services and information
- PIAC is authorized to:
 - Identify candidate PBI projects throughout California
 - Research PBI best practices/lessons learned
 - Assemble information related to P3s that Caltrans/RTAs can utilize
- At the request of Caltrans/RTAs, and for the payment of a fee, PIAC may:
 - Advise Caltrans/RTAs regarding best practices or the suitability of a particular projects
 - Provide procurement-related services to Caltrans/RTAs (presumably including drafting lease agreements)
- Comment on agreements prior to execution

Project Development Services for State Highway System Projects

For all PBI projects on the state highway system, Caltrans' employees and consultants are responsible for performing "project development services," such as drafting technical requirements documents and performance specifications, carrying out preliminary engineering and performing construction inspection services. This does not apply to RTA projects.

Procurement Methods/Process

- **Procurement Approaches** – Caltrans/RTAs may, but are not limited to utilizing, one or more of the following procurement approaches:
 - Solicitations for defined projects and calls for proposals within defined parameters;
 - Prequalification and short-listing prior to final evaluation of proposals;
 - Final evaluation of proposals based on qualifications and best value (CTC shall develop and adopt the evaluation criteria);
 - Negotiations with proposers prior to award; and
 - Acceptance of unsolicited proposals, provided that Caltrans/RTA's issue a request for competing proposals and award to the unsolicited bidder is not permitted unless there is at least one other responsible bid.
- **Low Bid or Best Value Selection** – Caltrans/RTAs may award a contract on the basis of either low bid or best value. Unlike design-build projects, this is left to Caltrans/RTAs' discretion.
- **Public Hearing** – Caltrans/RTAs must hold at least one public hearing at a location near the proposed facility for purposes of receiving public comment on the lease agreement
- **Legislature/PIAC Review of Lease / Public Comments**– At least 60 days prior to executing the lease agreement, Caltrans/RTAs shall submit the draft lease and any comments from the public hearing(s) to the legislature and PIAC for review. The legislature or Secretary of Business, Transportation and Housing may provide written comments to Caltrans/RTAs within this 60-day period. Caltrans/RTAs shall consider those comments prior to executing the lease. No approval is required from the legislature or PIAC to execute the lease.

Permitted (Not Required) Lease Provisions

- Lease of rights-of-way, issuance of permits or other authorizations needed to build the project
- Non-compete provisions that provide for reasonable compensation due to adverse effects on toll revenue/user fee revenue due to the development, operation or lease of other projects, except the following types of projects:
 - Projects identified in regional transportation plans;
 - Safety projects;
 - Improvement projects that result in incidental capacity improvements;
 - Additional HOV lanes or the conversion of existing lanes to HOV lanes; and
 - Projects located outside the project boundaries (limits set in the lease agreement).

This provision shall not infringe on the authority of Caltrans/RTAs to develop any transportation project. The compensation described above shall only be made after a demonstrable reduction in use of the facility resulting in reduced revenues and may not exceed the difference between the reduction in those revenues and the amount necessary to cover the costs of debt service, including principal and interest on any debt incurred for the development, operation, maintenance or rehabilitation of the facility.

Required Lease Provisions

- Ownership - Facility must be owned by Caltrans/RTA
- Tolling - Authorization for the contracting entity/lessee to impose tolls and user fees and to require that those tolls be applied to:
 - Payment of capital outlay costs
 - Costs associated with operations, toll and user fee collection and administration of the facility
 - Reimbursement to Caltrans or other governmental entities for costs of services to develop and maintain the project
 - Police services
 - A reasonable return on investment for the contracting entity/lessee
- Excess User Fees – The lease shall require that excess tolls / user fees be applied to any indebtedness incurred by the contracting entity/lessee for the project, project improvements or be paid to the State Highway Account, except that excess revenues from an RTA project may be paid to the RTA for use in improving public transportation in/near the project
- Specific Toll or User Fee Rates – The lease shall establish toll/user fee rates. Any proposed increase in those rates not otherwise described in the lease agreement must be approved by Caltrans/RTA after at least one public hearing.
- Reversion/Handback - Complete reversion/handback of the leased facility to Caltrans/RTA, along with the right to collect tolls, at the expiration of the lease. Facility shall be delivered in a condition that meets the performance and maintenance standards set by Caltrans/RTA and be free of any lien or other claims.
- Design/Build - Authorization for the contracting entity/lessee to use a design-build method of procurement for transportation projects, subject to the requirements for

utilizing such a method in Chapter 6.5 of the Public Contract Code (commencing with Section 6800), other than Sections 6802, 6803 and 6813, if those provisions are enacted by the legislature during the 2009-10 Regular Session or a 2009-10 extraordinary session

- Indemnity - Indemnity provisions, including a provision that indemnifies the State of California or RTA against any claims or losses resulting or accruing from the performance of the contracting entity or lessee
- Plans/Specifications – The plans/specifications developed for the project shall comply with Caltrans' standards for state transportation projects
- Performance Standards – The lease shall include performance standards, including, but not limited to, level of service requirements
- State highway System Projects – Agreement shall require such projects to meet noise mitigation, landscaping, pollution control and safety requirements that otherwise apply to Caltrans projects
- Project Information – Contracting entity/lessee shall provide any information requested by CTC or legislative analyst

Required Lessee/Contracting Entity Qualifications

- Evidence that the members of the lessee/contracting entity have the experience and capacity to complete the project
- Evidence that the proposed key personnel have sufficient experience and training to competently manage and complete the project
- Financial statement that ensures that the lessee/contracting entity has the financial capacity to complete the project
- Licenses, registration and credentials required to design and construct the project
- Evidence of the capacity of the members of the lessee/contracting entity to obtain all required payment and performance bonds, liability insurance and errors and omissions insurance (statute is silent regarding payment and performance bond requirements)
- Evidence of workers' compensation experience, history and an acceptable worker safety program
- Full disclosure of OSHA violations, contract defaults, bankruptcies, etc.

Extension of Tolling

- The CTC or RTA may choose to continue to collect tolls or user fees from a toll facility after the expiration of the lease agreement
- All such tolls or user fees shall be applied to the improvement, continued operation or maintenance of the facility

Project Cost Responsibility

- Caltrans, RTAs and other state/local agencies may provide project development services to the contracting entity/lessee for which the public entity is reimbursed
- Except as may be set out in the lease agreement, the lessee/contracting shall be responsible for all costs to develop, operate, maintain, etc. the project

Project Inspection

Caltrans or RTAs, as applicable, shall regularly inspect the facility and require the contracting entity/lessee to maintain and operate the facility according to adopted standards

Contracting Entity/Lessee Members Responsibility for Performance

If contracting entity/lessee is a partnership, joint venture or an association that is not a legal entity, the general partners, joint venturers or association members shall be fully liable for performance under the lease agreement

Creation of HOV Lanes

The act does not infringe on the authority to develop HOT lanes under S&H Code Sections 194.4-6

Conversion of Non-Tolled Lanes

Conversion of any existing non-tolled or non-user fee lanes into tolled/user fee lanes is prohibited, with the exception of HOV to HOT lane conversions

Real Property / Ad Valorem Taxation

PBI projects are deemed to be public property for a public purpose and exempt from leasehold, real property and ad valorem taxation, except for the use, if any, of that property for ancillary commercial purposes

Reporting Requirements

The CTC, in cooperation with the legislative analyst, shall annually prepare a report on the status of each project and any concerns or recommendations for changes in the program

Doyle Drive Project

Lease agreements may not affect, alter or supersede the November 26, 2008 MOU between the Golden Gate Bridge Highway and Transportation District, the Metropolitan Transportation Commission and the San Francisco County Transportation Authority relating to the financing of the US 101/Doyle Drive reconstruction project located in the city and county of San Francisco